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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

CHARLES STEVENSON,

Defendant and Appellant.

A152697

(San Francisco County
Super. Ct. No. SCN218679)

Defendant Charles Stevenson appeals from the sentence imposed after his robbery and commercial burglary convictions after jury trial. Defendant asserts the trial court erred in imposing the upper term for robbery. He also contends remand is necessary to allow the trial court to consider whether to exercise its discretion to strike his prior serious felony enhancements pursuant to recently enacted Senate Bill No. 1393. (2017–2018 Reg. Sess.)

We remand the matter for the limited purpose of allowing the trial court to consider its discretion under Senate Bill No. 1393 to strike defendant’s prior serious felony enhancements. In all other respects, the judgment is affirmed.

FACTUAL BACKGROUND

The charges against defendant stem from the events that took place at a San Francisco Walgreens drug store the evening of January 19, 2011. The store clerk who was working that evening testified at trial as follows. Defendant entered the store and walked up to the clerk’s cash register with a bottle of water. He handed the bottle to the

clerk, along with a \$5 bill. The clerk opened the register, and as he was getting ready to hand defendant his change, defendant punched him in the face. Defendant then grabbed cash from the register and fled through the back entrance. A security guard and several other Walgreens employees chased defendant as he left the store. As defendant attempted to escape on his bicycle, he lost control and crashed. Several people, including a passerby, jumped on defendant and held him down. Since defendant was physically resisting, another employee put defendant in a headlock. Defendant then hit and bit that employee. The police arrived and arrested defendant.

Defendant testified that, earlier that same evening, he met a friend at a bar to sell him cocaine. While at the bar, he snorted a white substance he believed to be cocaine that was given to him by a woman at the bar. He then left the bar on his bicycle, and almost immediately started to feel shortness of breath and a rapid heartbeat. Defendant later came to realize that the substance was methamphetamine.

After leaving the bar, defendant went to the nearby Walgreens store to purchase water. He took a bottle of water to the counter and handed it to the employee at the register, along with a \$50 bill. The employee looked at the bill and stated “[s]omething about I’m tired of you [derogatory term] counterfeiting us.” In response, defendant hit the employee and tried to retrieve his \$50 bill from the register. Defendant then ran to the back exit and was stopped and subdued by store employees. Defendant bit an employee after the employee put him in a “chokehold.” Defendant next remembers waking up in the hospital.

An expert in forensic psychiatry testified that defendant suffered from post-traumatic stress disorder and a depressive disorder that caused him to self-medicate with cocaine. The expert opined that defendant’s ingestion of methamphetamine at the bar “greatly affected his ability and capacity” to form the specific intent to steal the money from the Walgreens store.

PROCEDURAL BACKGROUND

In June 2017, the San Francisco County District Attorney filed a first amended information charging defendant with second degree robbery (Pen. Code, § 211)¹ (count 1), assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)) (count 2), and commercial burglary (§ 459) (count 3). As to the robbery count, the information included the allegations that defendant: committed the offense while on parole for having committed a serious or violent felony (§ 1203.085, subds. (a) and (b)); had five prior serious felony violations charged under the Three Strikes sentencing law (§§ 667, subds. (d)-(e), 1170.12, subds. (b), (c)); had five prior serious felony convictions (§§ 667, subd. (a)(1)); and had served five prior prison terms (§ 667.5, subd. (b)).

In July 2017, a jury found defendant guilty of robbery and misdemeanor commercial burglary and acquitted defendant of assault with force likely to cause great bodily injury and the lesser-included offense of simple assault. In the second phase of the trial, the jury found true all of the enhancements pertaining to the robbery count.

Defendant's sentencing brief advised the trial court that the same court had recently sentenced defendant in another case to 16 years 8 months in prison. In that case, defendant's prior strike conviction allegations had been stricken and defendant asked the court to do so in this case as well. Defendant asked the court to sentence him to the three-year midterm on count 1, strike all of the prior strike conviction allegations, and impose a 13-year sentence that included five years each on the two prior serious felony convictions.

The probation officer's presentence report proposed four circumstances in aggravation: (1) the crime involved "planning, sophistication, or professionalism" (California Rules of Court rule 4.421(a)(8)²) - defendant entered the store, punched the cashier in the face, grabbed the cash out of the cash register, fled, and bit a store personnel while being detained); (2) defendant's prior convictions as an adult or

¹ All further statutory references are the Penal Code unless otherwise indicated.

² All further rule references are to the California Rules of Court unless otherwise indicated.

sustained petitions in juvenile delinquency proceedings were numerous or of increasing seriousness (rule 4.421(b)(2) - over ten convictions since 1984); (3) defendant had served five prior prison terms (rule 4.421(b)(3)); and (4) his prior performance on probation and/or parole was unsatisfactory (rule 4.421(b)(5) - repeated probation or parole violations). The probation officer proposed no circumstances in mitigation.

On October 12, 2017, the trial court sentenced defendant to a total of 20 years, consisting of an aggravated term of five years on count 1 (robbery), doubled pursuant to section 667 as a strike, plus two five-year serious felony enhancements under section 667. The trial court also sentenced defendant to time served on count 3 (commercial burglary).

DISCUSSION

I. The Trial Court Acted Within its Discretion in Imposing the Upper Term for the Robbery Conviction Based Upon the Aggravating Factor of Perjury

Defendant argues that the trial court abused its discretion by considering his perjury at trial as an aggravating factor in imposing the upper term for robbery. We are not persuaded and find that the court acted well within its discretion when it imposed the upper term on the aggravating factor of perjury, specifically that defendant lied under oath at trial when he testified that he believed the white substance he ingested at the bar was cocaine and not methamphetamine, and that he had never used methamphetamine before.

We review a trial court's sentencing determination for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*).) The party attacking a trial court's sentence has the burden to show that the decision was clearly irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*); see *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582 [" '[s]entencing courts have wide discretion in weighing aggravating and mitigating factors [citations] . . . We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.' [Citation.]"]). In the absence of this showing, " 'the trial court is presumed to have acted to achieve legitimate

sentencing objectives’ ” (*Carmony, supra*, 33 Cal.4th at pp. 376–377.) In applying this standard, it is not our role to substitute our reasoning for that of the trial court, nor to “reweigh valid factors bearing on the decision below.” (*People v. Scott*, 9 Cal.4th 331, 355; see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978 [“ ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]”].)

Defendant was convicted of second degree robbery under section 211, which is a felony “punishable by imprisonment in the state prison for two, three or five years.” (§ 213). Section 1170, subdivision (b), provides: “[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court The court shall select the term which, in the court’s discretion, best serves the interests of justice.”

“[A] trial court is free to base the upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. [Citations.] The court’s discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be ‘reasonably related to the decision being made.’ ” (*Sandoval, supra*, 41 Cal.4th at p. 848.) “An aggravating circumstance is a fact that makes the offense ‘distinctively worse than the ordinary.’ [Citation.]” (*People v. Black* (2007) 41 Cal.4th 799, 817 (*Black*).) Aggravating circumstances include a finding that the defendant “suborned perjury, or in any other way illegally interfered with the judicial process.” (rule 4.421(a)(6)). Further, aggravating circumstances include those listed in the sentencing rules, as well as “any other factors . . . that reasonably relate to the defendant” (rule 4.421(c)) and any other facts that are “reasonably related to the decision being made.” (rule 4.408(a).) The court’s upper term sentence choice may be based on a single aggravating factor. (*Black, supra*, 41 Cal.4th at p. 806.)

“It is settled, under both federal and state law, that a court may enhance a defendant’s sentence upon finding the defendant committed perjury at trial.” (*People v. Howard* (1993) 17 Cal.App.4th 999, 1002 (*Howard*).) “[W]hen imposing an aggravated

sentence because of perjury at trial, the sentencing judge is constitutionally required to make on-the-record findings encompassing all the elements of a perjury violation. In California, those elements are willful statement, under oath, of any material matter which the witness knows so be false. [Citation.]” (*Id.* at p. 1004; citing *U.S. v. Dunnigan* (1993) 507 U.S. 87, 95–96.)

Here, defendant testified under oath and before the jury that he committed the robbery while under the influence of methamphetamine that he mistakenly believed was cocaine. On cross-examination, when defendant was asked whether he had ever used methamphetamine prior to the date of the robbery, defendant responded “No.” Defendant persisted with this denial under oath despite being questioned about prior instances when he admitted to law enforcement his years as a methamphetamine addict. Subsequent to this testimony, the People and defendant entered into a stipulation, introduced as a trial exhibit, regarding statements made by defendant in 2007: (1) defendant “stated to a probation officer during an intake interview with the San Francisco Adult Probation Department that he sniffs methamphetamine and cocaine”; (2) during the interview with the Adult Probation Department, defendant “also stated he suffered from an addiction both to crack cocaine and crystal methamphetamine”; and (3) “[d]uring an intake interview at the California Department of Corrections, [defendant] reported that cocaine by inhalation and methamphetamine by inhalation, among others, were his drugs of choice.”

As noted by the trial court in imposing the high end five-year term, defendant’s “entire defense” was lack of intent premised upon his allegedly mistaken ingestion of methamphetamine. Therefore, not only was it clear that defendant had lied given the clear documentation of his prior statements regarding his use of and addiction to methamphetamine, but the lie was central to the case. In other words, it reflects defendant “still thinks he can engage in . . . gamesmanship to manipulate the system.” Defense counsel objected that the trial court’s indicated sentence prior to the hearing had been to the three-year term on count 1. The trial court replied “I did indicate that but I also indicated to you that [the prosecutor] had persuaded me to sentence to the aggravated

term Your client lied on the stand. He lied to you, and he lied on the stand, and he committed perjury.” The court reminded defense counsel that “[t]en years ago [defendant] told [the] probation department that he had been addicted to methamphetamine for years.”

A. The Trial Court Made the Requisite Findings

Defendant contends that the trial court failed to make the “on-the-record findings encompassing all elements of a perjury violation” as required by *Howard*. (See *Howard*, *supra*, 17 Cal.App.4th at p. 1002.) Defendant has waived this objection since, as he admits, defendant “did not make a specific objection” on this ground. (See *People v. Middleton* (1997) 52 Cal.App.4th 19, 36, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3 [defendant waived claim of error based on *Howard* because trial counsel “did not object to the enhancement for perjury and did not object to the lack of findings on each element of perjury”].)

Even if defendant had not waived this claim, the record demonstrates that the trial court made the requisite findings under *Howard*. (See *Howard*, *supra*, 17 Cal.App.4th at 1002.) The elements of perjury under California law are “a willful statement, under oath, of any material matter which the [defendant] knows to be false.” (*Id.* at p. 1005.) First, the trial court made a finding that defendant made a willful statement, under oath, that he had not used methamphetamine. Next, the trial court indicated that defendant’s statement regarding his use of methamphetamine was material because defendant made the statement to negate intent: “The fact that [defendant] did lie . . . on the stand about his previous use of methamphetamine is a strong argument. It does reflect that [defendant] still thinks he can engage in the form of gamesmanship to manipulate the system. [¶] But then . . . the documentation . . . provided proof that . . . [defendant] had previously admitted to probation that he had been addicted to methamphetamine. And so what we have here is a situation where the entire defense that was presented by [defendant] was a lie.”

Finally, the court indicated that defendant knew his statement that he had never used methamphetamine was false. The court reminded defense counsel that “[t]en years

ago [defendant] told [the] probation department that he had been addicted to methamphetamine for years.” Further, defendant’s argument in his briefs highlight that his false statement was made knowingly: “the judge sentenced [defendant] to four years in prison for ‘lying’ to escape being convicted of robbery for this rather piddling incident,” and defendant “lied in a desperate attempt to avoid a robbery conviction.”

Even if the trial court had not made express findings encompassing all of the elements of perjury, any error would be harmless as it is clear that the defendant did not give “inaccurate testimony ‘due to confusion, mistake or faulty memory.’ ” (See *Howard, supra*, 17 Cal.App.4th at p. 1005). We find nothing in the record to demonstrate that “confusion, mistake or faulty memory” were to blame for defendant’s false statements about his use of methamphetamine. On the contrary, the trial court emphasized that defendant’s lies demonstrated “gamesmanship to manipulate the system.” Further, this observation related to whether defendant had accepted responsibility for his actions and was amendable to rehabilitation. (See *People v. Montano* (1992) 6 Cal.App.4th 118, 122 [“[a] defendant’s willingness to commit perjury is directly related to his or her character and amenability to rehabilitation”].)

Defendant also argues that it “was simply cruel and arbitrary to impose that additional term simply because he lied in a desperate attempt to avoid a robbery conviction.” “ ‘Whether a punishment is cruel and unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations].’ ” (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358). Under the California Constitution, “a sentence will not be allowed to stand when it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity, considering defendant’s history and the nature of the offense.” (*People v. Blackwell* (2011) 202 Cal.App.4th 144, 158 (*Blackwell*), disapproved of on another ground in *People v. Gutierrez* (2014) 58 Cal.App.4th 1354, 1370–1371.)

The cases cited by defendant in support of his argument that imposition of the upper term constitutes cruel and unusual punishment are inapposite to the facts and the

sentence imposed here. (See *Graham v. Florida* (2010) 560 U.S. 48, 58–61 [Supreme Court held as a “categorical” rule that imposing a life without parole sentence on a juvenile defendant who is convicted of a nonhomicide offender violates the Constitution’s prohibition against cruel and unusual punishment]; *People v. Dillon* (1983) 34 Cal.3d 441, 486 [imposition of a life sentence for a minor under felony murder rule was cruel and unusual punishment considering “defendant’s attenuated individual culpability.”]) We find that imposition for the upper term in this case is not so disproportionate to the robbery committed by defendant that it “shocks the conscience and offends fundamental notions of human dignity” and therefore do not find it cruel and unusual. (*Blackwell, supra*, 202 Cal.App.4th at p. 158.)

Finally, we do not reach the People’s contentions regarding the aggravated circumstance for planning or sophistication. Fundamentally, it is clear from the record that the trial court’s focus was on the perjury. While the trial court refused to strike the “planning, sophistication, or professionalism” aggravating factor from the presentence report since it was “a reasonable interpretation” that defendant engaged in at least some rudimentary planning to commit the crimes, the court did not cite this aggravating factor when imposing sentence or when explaining its rationale for imposing the aggravated term. The trial court’s reliance on the single aggravating factor of perjury was enough to justify imposing the upper term. (See *People v. Osband* (1996) 13 Cal.4th 622, 728–729 [“[o]nly a single aggravating factor is required to impose the upper term”].)

II. The Case Should be Remanded for Resentencing in Light of Recently Enacted Senate Bill No. 1393

We agree with both defendant and the People that it is appropriate to remand this matter to allow the sentencing court to decide whether to exercise its discretion to strike defendant’s prior serious felony enhancements pursuant to Senate Bill No. 1393. (2017-2018 Reg. Sess.)

Senate Bill No. 1393, which went into effect on January 1, 2019, amended former sections 667, subdivision (a), and 1385, subdivision (b). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Under the prior versions of sections 667 and 1385, “the

court [was] required to impose a five-year consecutive term for ‘any person convicted of a serious felony who previously has been convicted of a serious felony’ [citation], and the court ha[d] no discretion ‘to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667.’ ” (*Garcia, supra*, 28 Cal.App.5th at p. 971.) Senate Bill No. 1393 amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a trial court to exercise its discretion to strike a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2; *Garcia, supra*, 28 Cal.App.5th at p. 971.)

“Senate Bill 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final when Senate Bill 1393 [became] effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at pp. 971–972.) Although the Legislature did not expressly declare that Senate Bill No. 1393, or the amendments it made to sections 667, subdivision (a) and 1385, subdivision (b), apply retroactively, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 be[came] effective on January 1, 2019. [Citations.]” (*Id.* at p. 973; citing *In re Estrada* (1965) 63 Cal.2d 740.)

As defendant’s judgment is not yet final, Senate Bill No. 1393 and the amendments it made to sections 667 and 1385 apply retroactively to his sentence. Remand is required as nothing in the record demonstrates that the sentencing court would not have stricken the two five-year prior serious felony enhancements if it had the discretion to do so. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 [“[r]emand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so”].)

DISPOSITION

The sentence imposed on the prior serious felony enhancements under section 667, subdivision (a)(1) is vacated. The matter is remanded to the trial court for resentencing limited to determining whether one or both of the prior serious felony enhancements should be stricken or dismissed under section 667, subdivision (a) and section 1385, subdivision (b), as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013 §§ 1–2, eff. Jan. 1, 2019). If the trial court does not strike or dismiss the serious felony enhancements, then the sentence on those enhancements shall be reinstated as originally imposed. The trial court is directed to issue a new minute order and an amended abstract of judgment after such resentencing to reflect whether it strikes or dismisses, or reinstates the sentence on the prior serious felony enhancements. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Petrone, J.

WE CONCUR:

Siggins, P.J.

Fujisaki, J.

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